Office-Supreme Court, U.S.
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No. 81-2102

In the Supreme Court of the United States

October Term, 1981

HUSTLER MAGAZINE, INC., AND LARRY C. FLYNT,
Petitioners,

vs.

ROBERT C. GUCCIONE,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

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Petitioners' Reply Brief

On Petition For A Writ Of Certiorari
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PETITIONERS' RESPONSIVE STATEMENT OF THE CASE

As tried by the jury, this case is based solely (A8-9) upon the publication in the June, 1979 issue of Hustler of a photocartoon (A72) of Respondent Robert Guccione (hereinafter "Guccione"), an all purpose public figure ("Cartoon").

Guccione does not deny any of the facts set forth on pp. 7-19 of Petitioners' Main Brief. Instead, Guccione asserts on pp. 3-4 of his Brief that the Cartoon was published

in June 1979 in defiance of a lawyer's letter "warning" that it would result in a lawsuit. First, that "warning" letter is completely irrelevant to the Cartoon since that letter (i) was sent two and one-half years before (i.e., January 13, 1977), and (ii) referred to an different matter (i.e., an intended advertisement by Hustler comparing circulation and other advertising figures of Hustler with Guccione's Penthouse). Secondly, the publication of the Cartoon could not have been intended by Petitioner Flynt (hereinafter "Flynt") to defy any prior lawsuit or warning by Guccione because the Ohio Appellate Court held that Flynt had no personal involvement in, or connection with, the issue of Hustler which contained the Cartoon!

Guccione's Brief at p. 3 complains about a cartoon in Hustler in May 1976 referring to Guccione, which was the subject of Counts one and two of Guccione's Complaint. However, the trial in this case was based only

on the Cartoon in the June 1979 issue of Hustler (A8). Second, the May 1976 cartoon showed an open case of "Vaseline" in a Mr. "Goccione's" office and stated in part that Guccione didn't "... need 'Vaseline' to make [his] camera fuzzy and romantic ..." This May 1976 cartoon, like the Cartoon, parodied Guccione's use of Vaseline on his camera lenses to create his "soft-focus" photographs of nude models. Third, the May 1976 cartoon was satirizing (i) Guccione's venereal diseases, and (ii) his sexual encounters described in his 1975 book The First Time (pp. 313-314 of trial transcript). Guccione publicly revealed in his book very intimate details about his many different sexual encounters and venereal diseases, stating on page 78:

> "... I went through a period of terrible promiscuity ... I was getting laid four or five times a day. I was living with a Pan-American ground hostess and screwing her two and three times a day, and as soon as she left for work in the morning I was out on the move looking for something else. ... Whores turned me on, and they still do to some extent,

and I must have screwed more than a hundred of them ... I went through a period when I was impotent for three or four years. I picked up a couple of minor venereal diseases." (Emphasis added.)

Guccione at pp. 4-5 of his Brief, refers to Flynt's comment on Time, Inc. v. Firestone, 424 U.S. 448 (1976). Even if Flynt's philosophy on the First Amendment were relevant, Guccione has misstated it:

"Mr. Grutman: Well, I'm asking if you disagree with the Supreme Court about what it said a publisher could or could not do. Did you believe that you were required to follow what the Supreme Court said?
Answer: We'd always tried to follow the law.
Question: Where you disagree with the law, what do you do then?
Answer: We still try to follow the law." (p. 406 of Trial Transcript)

REASONS FOR GRANTING THE WRIT

A. The Ohio Appellate Court's Holding That Flynt Had No Actual Advance Knowledge of, or Involvement in, the Cartoon Precludes a Finding of Actual Malice

Guccione incorrectly argues at p. 6 of his brief that the Appellate Court finding that Flynt had no connection with, or personal involvement in, the Cartoon is "dicta" and "relates solely to the invasion of

privacy claim ..." However, the Ohio Appellate Court held without any such limitation that Flynt had no personal

> "... involvement in the June 1979 publication either by use of (Respondent's) name or the obtaining of (his) photograph and the use thereof..." (A23)

The Ohio Appellate Court then applied this holding to both the invasion of privacy and libel claims. Specifically, the Ohio Appellate Court then applied, to the libel claim, that factual finding and held:

> "On the other hand, defendant Flynt's position as the publisher and chairman of the board of Hustler makes him individually liable for a libel printed in Hustler, even if he had no actual knowledge of the libel prior to its publication." (Emphasis added). (A22-23)

In support, the Court then cited the Ohio rule, that in determining whether a publisher is liable for a libel in his newspaper "... it is immaterial whether or not he knew the contents of the publication ..." (A24). After citing that rule, the Ohio Appellate Court repeated its prior holding that as Hustler's Publisher and Chairman,

Flynt was strictly liable for publication of the Cartoon. (A24)

In dictum, the Court then stated:

> "In addition there is ample circumstantial evidence that the publication in the June 1979 issue of Hustler was a continuation of a policy previously established by defendant Flynt when he was president, as well as publisher and chairman of the board of Hustler". (A24)

Thus, the "circumstantial evidence" referred to the fact that:

> "the June 1979 issue of Hustler was a continuation of a policy previously established by ... Flynt."

Obviously, Hustler's continuation of a policy (after Flynt was shot and incapacitated) is not probative of whether Flynt had "actual malice" with reference to a Cartoon he had no knowledge of prior to publication, merely because he retained the titles of "Publisher" of Hustler and Chairman of the Board. Thus, contrary to Guccione's assertion at p.7 of his brief, the Ohio Appellate Court did not state that there was "circumstantial evidence" to warrant a finding of "actual malice" by Flynt.

Guccione, at pp. 7-8 of his brief raises a factual dispute about alleged trial evidence that Flynt had actual involvement with the June 1979 issue of Hustler. This alleged evidence was weighed and rejected by the Ohio Appellate Court when it held that no reasonable jury could have concluded that Flynt had any prior knowledge of, or involvement in, the June 1979 issue of Hustler. (A23-24)

Guccione then argues that this finding:

> " ... cannot raise a constitutional question ... where the jury was properly instructed and the factual question of malice resolved against Flynt ... the trial court (n)ever suggested that Flynt's liability rested upon any notion of strict liability."

First, as set forth hereinafter, the jury was not properly instructed on "actual malice". Second, the Ohio Appellate Court, resolved the issue of Flynt's non-involvement in the Cartoon in Flynt's favor. Third, while the trial court may not have held Flynt strictly liable, the Ohio Appellate Court's ruling did.

B. The Jury Instruction was Based Upon a Misreading and Misapplication of St. Amant

Guccione contends at p. 11 of his brief that "...it surely was not error to give the St. Amant instruction..." This assertion is based on a misreading of St. Amant v. Thompson, 390 U.S. 727 (1968)[1]. The trial Court's St. Amant charge would have been proper as to Flynt, only if it had first been proven that Flynt (i) knew of the existence of the Cartoon prior to its publication, (ii) intended it to be a serious assertion of fact, and (iii) had serious doubts about its truthfulness.

Guccione states on pp. 11-12 of his Brief that Petitioners did not object to the trial court's erroneous St. Amant charge. First, Guccione's attorney knows that Petitioners did object to the Court's St. Amant charge in a thorough discussion

1/ In St. Amant the defendant, unlike Flynt, had been personally aware of the item complained of before it was published. The defendant in St. Amant was contending only that he believed the published language to be true.

of that charge conducted in chambers between counsel and the court. Second, after such discusson Petitioners objected on the record:

> "Mr. Brownfield: Page 21, objection to the entire page, entire charge given there because it is wrong, St. Amant versus Thompson, that is wrong." (A109)

Thus, the Ohio Appellate Court erred by stating that Petitioners had not objected to the "St. Amant" charge. (A28). Therefore, Petitioners seek to correct that error.

C. A Jury Instruction that Parody or Satire can be Libelous Merely Because It Is "False and Fabricated", or "The Product of the Defendant's Imagination" is Unconstitutional.

Guccione's Brief notes on page 12 that Petitioners "... made no effort to show the truth of the matters asserted ..." Of course, Petitioners never argued that the Cartoon was truthful because it was intended fiction as parody and satire. As set forth on pp. 8-11 of Petitioners' main brief, the Cartoon was not meant to be, and could not be reasonably interpreted as, a serious assertion of fact. The St. Amant instruc-

tion erroneously directed the jury to conclude that Petitioners had "actual malice" merely because the intended fictional Cartoon as parody or satire was "false and fabricated" or a "product of the defendant's imagination".[2/] This error was compounded by the failure to permit Petitioners to present expert testimony on parody and satire. (A24)

Guccione at p. 14 of his brief states:

> "... Ohio ... has specifically rejected the defense of humor to a libel action."

Guccione then, at pp. 14-15, cites Ohio case authority which holds that a media defendant

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2/ Moreover, the "actual malice" standard should not have been applied to this case of a satire or parody in the form of intended fiction, unless it had first been proven by clear and convincing evidence that the Petitioners' intended the Cartoon to be a serious assertion of fact. "Ridicule ... always involves falsity. To apply the Sullivan tests--... premised on the speaker's regard for the truthfulness of his statement -- to ridicule is plainly ludicrous." Silver, "Libel, The Higher Truths of Art and the First Amendment," 126 U. Pa. L. Rev. 1065, 1094 (1978).

is liable for a statement about an all purpose public figure, even though it:

> "can be regarded as made in jest ... unless it is perfectly manifest from the language employed, that it could in no respect be regarded as an attack upon the reputation ... of the person to whom it related." (Emphasis added.)

This rule not only eliminates the requirement of actual malice proven by clear and convincing evidence, but shifts that burden to media defendants, such as Petitioners.

Under this rule, parody and satire are not possible without liability for defamation because in some respect every parody, satire or criticism of an all purpose public figure can be regarded "as an attack upon the reputation" of such person. Intended fiction is not libelous if it is not intended to be a serious assertion of fact.[3/]

3/ Arno v. Stewart, 245 C.A.2d 955, 54 Cal. Rptr. 392 (App. 1st Dept. 1966); Blake v. Hearst Publications, 75 C.A.2d 6, 170 P.2d 100 (App. 2d Dist. 1946); Lamberti v. Sun Printing & Pub. Assn., 111 App. Div. 437, 97 N.Y.S. 694 (2d Dept. 1906); Meyers v. Boston Magazine, 403 N.E. 2d 376 (Mass. 1979); Univ. of Notre Dame v. Twentieth Century Fox, 22 A.D.2d 452, 256 N.Y.S.2d 301 (1st Dept.).

The cases cited by Guccione at p. 15 concerning fiction dealt with whether the fictional works were intended to make representations of fact about a plaintiff who was thinly disguised in the fictional work. If there are no representations of fact, as in this case, there can be no libel.[4/]

D. A Jury Finding of Liability Violates Due Process When it Results From Passion and Prejudice.

The Ohio Appellate Court found that:

> " ... (the) enormous excessiveness of the ($38,000,000) jury verdict (against Petitioners), which was 13 times the amount the trial court found to be reasonable ... coupled with the repeated appeals [by Guccione] to the passion and prejudice (of the jury) can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice..." (A40-41).

The passion and prejudice of the jury was so great[5/] that it tried to put Petitioners

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4/ "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact" Letter Carriers v. Austin, 418 U.S. 264 at 284 (1974).

5/ The Ohio Appellate Court also found "... that the jury verdicts are hopelessly inconsistent and defective ..." (A31) and that the jury had "... a misunderstanding ... as to their functions." (A34) (See also A32-33.)

"out of business ... by awarding an amount of ... damages so great that they could no longer publish" (A40-41).

The following specific factors found by the Ohio Appellate Court to have appealed to the passion and prejudice of the jury inherently must have[6/] contaminated the jury's verdict on liability (i.e., the issue of whether Petitioners intended the Cartoon to be parody and satire, and not a serious assertion of fact).

> "(1) evidence of apparent libel ... of persons other than plaintiff; (2) the efforts during cross-examination of defendant Flynt to depict him as an evil person; ... (4) outbursts of plaintiff Guccione during cross-examination tending to appeal to the passion and prejudice of the jury;... and (7) the closing argument of plaintiff's counsel" (A38)

Guccione wrongly asserts at pp. 16-17 of his Brief that an excessive jury verdict

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6/ There is proof that the extreme prejudice and passion of the jury actually contaminated the verdict of liability, since the jury found that Flynt was liable for damages for libel and invasion of privacy, even though he had no actual knowledge of, or involvement in, the publication of the Cartoon, and despite the instruction to the jury that such actual knowledge is an element of the latter tort.

caused by passion and prejudice does not require a new trial, and that a remittitur is proper in such a case. The Federal cases cited by Guccione do not support this assertion because those verdicts had not been influenced by passion and prejudice.[7/]

Guccione incorrectly asserts at p. 16 of his brief that the issue:

> "... of liability in this case was distinct from the issue of damages..."

Since Guccione is an all-purpose public figure, actual malice for <u>both liability and punitive damages</u> must be proven against the

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7/ In <u>Curtis Publishing Co. v. Butts</u>, 351 F.2d 702 (5th Cir. 1965), the Court noted that the excessive award of damages was <u>not</u> based on passion or prejudice. In <u>Edwards v. Sears, Roebuck & Co.</u>, 512 F.2d 276 (5th Cir. 1975), the Court noted "the distinction between verdicts excessive in an amount which may properly be reduced by remittitur, and those <u>resulting from passion and prejudice, which may not be so corrected.</u>" (Emphasis added.) In fact, the <u>Edwards</u> court reversed the lower court's decision to grant remittitur and remanded for a new trial on both liability and damages stating: "...the award of damages (was)... grossly excessive...,

media defendant Petitioners. The inseparability of the question of liability from that of damages is set forth on pp. 61-64 of Petitioners' main brief. Instead of responding to those pages, Guccione incorrectly asserts on p. 16 that "... there was overwhelming evidence to uphold the finding of liability". Guccione is wrong! As to Flynt, the Ohio Appellate Court held that he had no prior knowledge of, or involvement

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7/ Counsel's final argument to the jury was clearly prejudicial..., the jury's verdict was swayed by passion and prejudice, and the jury failed to respond to the court's instructions...these factors indicate that the issues of liability and damages were both improperly influenced. ...a new trial is mandated." In Dorin v. Equitable Life Assurance Society, 382 F.2d 73, 77 (7th Cir. 1967), the Court stated:
"If a verdict is a result of appeals to passion and prejudice, the trial court must unconditionally order a new trial and cannot give the plaintiff an option to accept a lesser amount."
In fact, the Ohio Appellate Court in this case recognized the above rule stating: "...where a verdict is so excessive as to have been given under the influence of passion or prejudice, it must be set aside and a new trial granted, a remittitur being inappropriate..." (A 36).

in, the publication of the Cartoon. As to Petitioner Hustler, the only witness on the issue of why Hustler published the Cartoon testified that his intent and that of Hustler in publishing the Cartoon, was to parody and satirize Guccione's open sexual conduct and his "Vaseline lens" techniques.

E. There is a Final Judgment Below for the Purpose of Granting Certiorari

The applicable doctrine of finality is set forth in Cox Broadcasting Corp. v. Cohen, 420 U.S. 469 (1975),[8/] which established four categories of cases in which this Court will assume jurisdiction despite the fact that there may be further proceedings in state courts below.

8/ Cox, which also involved First Amendment issues of freedom of the press, is very similar to this case. The procedural postures are almost identical. In fact, in Cox the issue of liability had not even been determined by the trial court! Despite the lack of any final judgment at all on the issue of liability in Cox, this Court accepted the appeal. In this case there is a final judgment of the highest state court on liability.

This case falls into three Cox categories. The first category,

> "those cases in which there are ... proceedings -- even entire trials -- yet to occur in the state courts, but where ... the federal issue is conclusive or the outcome of further proceedings preordained", 420 U.S. at 479,

is applicable since the Ohio courts have rejected Petitioners' constitutional defenses and conclusively determined the issue of liability. Thus, there is no possibility of a judgment for Petitioners.

This case also falls into the second Cox category, cases

> "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings," 420 U.S. at 480.

The constitutional issues raised by Petitioners will survive regardless of the amount of damages found by the trial court.

> "Nothing that could happen in the course of the [trial on damages] short of settlement of the case, would foreclose or make unnecessary decision of the federal questions." Id.

Finally, the fourth Cox category applies:

> "where reversal of the state court would be preclusive of any further litigation on the relevant cause of action...if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-483.

The erroneous rulings by the Ohio Appellate Court on the First Amendment and due process issues presented by Petitioners constitute final decisions on those issues. The Ohio state courts will not again consider these issues if this Court declines to assume jurisdiction and the case is remanded to the trial court, while reversal of the Ohio courts on these issues would preclude further litigation against the Petitioners. Since the Ohio Appellate Court held that Flynt had no advance knowledge of, or involvement in, the publication of the Cartoon, it is clear that Guccione would be unable to prevail against Flynt on the issue of liability if this Court answers either of the first two Questions Presented in

Petitioners' favor. Guccione also would be unable to prevail against either Petitioner if this Court answers the third Question Presented in Petitioners' favor since the Cartoon was intended to be, and was, constitutionally protected speech in the form of parody and satire. A refusal to review the Ohio Appellate Court's decision will clearly erode important federal policies with respect to freedom of the press and due process of law.[9/] For purposes of granting certiorari, the judgment below is final since further state court proceedings cannot remove the federal constitutional issues in the Questions Presented.[10/]

9/ As stated in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247 n. 6 (1974): "Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, ... an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture ... could only further harm the operation of a free press."

10/ New York v. Cathedral Academy, 434 U.S. 125, 128 n. 4 (1977); Brady v. Maryland, 373 U.S. 83 (1963).

Without immediate review by this Court, there will be a significant "chilling effect" since Petitioners (and other media defendants) will be subject to (1) very substantial and unnecessary legal expenses, and (2) a substantial money judgment, despite the clear violations of their rights under the First and Fourteenth Amendments.

Respectfully submitted,

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